



The Bush Administration's Shameful Legacy for Farmworkers: Midnight Regulations on the H-2A Agricultural Guestworker Program

Shortly before leaving office, the Bush Administration made midnight regulatory changes to the H-2A agricultural guestworker program. The changes were devastating for farmworkers and contravene our nation's most basic labor and immigration policy concepts. The changes went into effect on January 17, 2009. Fortunately, Secretary of Labor Hilda Solis prioritized reversing these changes in order to restore long-standing program protections intended to prevent negative impacts on the wages and working conditions of US workers. Within a month of being confirmed, Secretary Solis attempted to suspend the Bush regulations but was successfully enjoined by the growers. Subsequently, Secretary Solis issued new H-2A regulations that took effect on March 15, 2010, largely restoring the pre-Bush regulations that had been in effect since 1987 with some modest protections. Agricultural employers again sued Secretary Solis but were unsuccessful this time. Today, many growers continue to advocate for legislative reforms that would make eliminate many of the protections reduced by the Bush Administration, in addition to other harmful changes.

The H-2A guestworker program allows agricultural employers to hire temporary foreign workers only if they can prove there is not a sufficient supply of U.S. workers and that the wages and working conditions they are offering will not adversely impact U.S. workers. These safeguards are necessary because foreign workers, out of desperation, may be willing to accept substandard wages and working conditions. U.S. workers cannot effectively compete against foreign workers willing to work for any wage, under any conditions. Over the years, modest protections were built into the H-2A program to protect the domestic labor force from unfair competition and adverse impacts on wages and working conditions and vulnerable foreign workers from exploitation. The Bush Administration's midnight changes to the H-2A program reduced these worker protections, including by slashing farmworker wages, limiting the ability of U.S. farmworkers to obtain needed jobs, permitting the discriminatory treatment of U.S. farmworkers in wages and benefits, and dramatically reducing government oversight and enforcement.

The Bush Administration's final H-2A rules contained pages of detailed regulatory changes and ineffectual attempts to justify the harmful contents. Following are examples of some of the worst provisions, all of which have been restored by the Obama Administration.

The Bush regulations violated the H-2A statute by eliminating labor certification, which is required by the statute, and replacing it with "attestation." The H-2A statute requires an employer seeking to bring in temporary foreign labor to obtain from DOL a certification that there is a shortage of U.S. workers and that the employer offered competitive wages and working conditions. Instead, the Bush regulations allowed a labor attestation, which meant that the employer only needed to check off a few boxes and promise to comply with the law. Under these rules, DOL did not engage in any meaningful up-front review of the wages or working conditions or recruitment of U.S. workers. Workers' rights in the H-2A program are routinely violated and this illegal reduction in government oversight invited even greater abuse of the program.

The Bush H-2A Regulations Slashed Farmworker Wages and Reduced and Eliminated Other Benefits.

- Under the pre- and post Bush regulations, DOL required H-2A employers to offer workers at least the average regional hourly wage for farmworkers as determined by the USDA Farm Labor Survey. Although this survey's results were low because of the presence of a large number of undocumented workers, the Bush Regulations lowered the wage rates even further by switching to the Bureau of Labor Statistics' Occupational Employment Survey, which does not even survey farms, but farm labor contractors, the lowest paying employers of farmworkers. DOL also allowed employers to pay one of four "wage levels," with most employers paying the lowest level, which is the average wage received by the lowest-paid one-third of farmworkers in a geographic area, (i.e., the 16th percentile). The only real floor was the state or federal minimum wage even though many farmworkers earned more.

According to an economic analysis conducted by DOL, the Bush regulation's change to the wage rates for applications filed after the January 2009 effective date resulted in a decline in the national average wage for H-2A workers to \$8.02 per hour, a more than 10% drop from the national average of about \$9.04 that would have applied as determined under the pre-Bush wage survey methodology.¹ The DOL estimated that each worker employed by an H-2A employer in 2009 suffered about \$1,616 in lost wages as a result of being paid under the Bush wage rate rather than under the Solis/ pre-Bush method.²

- The H-2A program for decades has required employers to reimburse the workers for their long distance travel costs to the place of employment upon completing the first half of the season, and then pay for their way back to their homes if they complete the season. The Bush regulations only required employers to pay the costs of transportation for H-2A workers to and from the U.S. consulate or port of entry, even though workers often live far from these locations and are recruited where they live, not near these locations. This provision drove foreign workers further into debt, making them even more vulnerable to exploitation than they already were. Under the Solis regulations, workers are once again entitled to the full transportation costs from their place of recruitment to and from their place of employment, resulting in reimbursements of average transportation cost of \$63 per worker per year that were not required to be reimbursed under the Bush regulations.³

- The Bush regulations allowed U.S. workers who the grower says were hired before the H-2A workers to be paid less and receive fewer benefits than the H-2A workers with whom they worked side-by-side. Allowing such disparate pay and benefits undermined the law's goal of ensuring that U.S. workers are not adversely affected by the presence of temporary foreign workers.

The Bush Regulations Denied U.S. Workers Access to Needed Jobs by Minimizing Growers' Obligations to Recruit and Hire U.S. Workers Despite Staggering Unemployment Rates in Agriculture.

- The Bush rules withdrew employers' obligations to engage in the same kind and degree of recruitment for U.S. workers as employers do for foreign workers. This allowed employers to claim that they couldn't find any U.S. workers without making any real effort, while at the same time engaging in huge recruitment campaigns in Mexico and other nations in the effort to find

¹ 75 Fed. Reg. 6497 (Feb. 12, 2010).

² Ibid, 6953-54. The Department of Labor multiplied the hourly wage decrease (\$1.02) by 8 hours to obtain a daily loss in wages of \$8.16 ($\1.02×8). DOL then multiplied this daily wage loss by 198, which is the average number of days worked by H-2A workers. This resulted in a total wage loss of \$1,616.68 ($\8.16×198) per worker per year.

³ 75 Fed. Reg. 6,884, 6,964 (Feb. 12, 2010).



guestworkers. Further, DOL decided that H-2A employers need not engage in positive recruitment in known areas of farm labor supply if those areas had other agricultural employers looking for farmworkers to do comparable work.

- One way the H-2A program protects the rights of U.S. workers to H-2A jobs is by giving them preference to H-2A jobs for the first 50% of the contract period. The Bush regulations gutted this protection by eliminating it over a five-year period, during which time workers would only have had a 30-day preference. This change meant that U.S. workers applying for an H-2A job lasting 10 months were ineligible for the job after the first 30 days, even if they had always worked for that employer. Many agricultural jobs have peak seasons and a need for increased numbers of workers long after the initial 30 days.

As the Bush Administration's changes to the H-2A program demonstrated, eliminating and reducing protections and oversight from guestworker programs is not the answer to the dire situation facing agricultural employers and farmworkers, the majority of whom lack authorization to work. There is a solution to stabilize the farm labor force and ensure fair treatment of farmworkers: provide undocumented farmworkers with the opportunity to earn legal immigration status with a path to citizenship and remove employer incentives to rely on guestworkers instead of hiring US workers.